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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1959

No. 773

UNITED STATES OF AMERICA for the use and benefit of
J. A. EDWARDS & CO., INC.,

*Petitioner,*

*against*

PETER REISS CONSTRUCTION CO., INC., and
THE TRAVELERS INDEMNITY COMPANY,

*Respondents,*

*and*

BEN B. GREENE, INC.,

*Defendant.*

## PETITIONER'S REPLY BRIEF

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## PETITIONER'S REPLY BRIEF

A. The respondents sprinkle invective on, and take exception to, petitioner's formulation of the questions presented for review. Respondents, however, disregard Rules 24 and 40 (Supreme Court Rules, 28 U.S.C.A.), by failing to submit their own version of such questions (Respondents' Brief, p. 2). This omission represents more than a technical transgression. It is intimately bound up with respondents' failure to meet the issues. Respondents' brief further omits references to the record or to the appendices below to sustain any of its arguments or contentions. Misstatements appear in respondents' brief, some of which may be pin-pointed, as follows:

(1) At page 3 (and again at page 6), respondents state that "the Court below * * * under the peculiar facts of this case" held that petitioner could not revive its claim by an insignificant delivery "after it had concededly lapsed, since no notice was sent within the 90-day period * * *." There was no such holding below and no such concession was made at any time. (See, also, Finding No. 18 and Respondents' concession in the Court of Appeals; Petition, pp. 8, 9.)

(2) At page 6, respondents state that after the October 31, 1956 delivery "there followed over four months of silence". Respondents completely ignore the letters dated January 9, 1957, January 21, 1957 and other correspondence engaged in after the October 31, 1956 delivery (Petition, pp. 2, 6, 7).

(3) At page 7, respondents argue that the Court of Appeals "concerned itself with the one real issue in this case, i.e., whether a delivery of an isolated and insignificant item after a lapse of over four months could revive a dead claim". *This is not the issue at bar and respondents cite no language from the opinion in support of such contention.* (See (4) and B (infra).)

(4) At page 10, respondents argue that the Court of Appeals below "did not predicate its decision" on the "artificial distinction between a materialman making deliveries to a government project under separate orders and a single overall contract". The opening sentence of the Court of Appeals decision is eloquent proof to the contrary (Petition, Appendix B, p. 19; see also Court's reference to its prior decision in Bourquin, Appendix B, p. 21).

B. The opinion below reveals that if, in a hypothetical case, petitioner, instead of delivering a safety switch on March 5, 1957 amounting to $15.90 had, instead, delivered electrical material aggregating $1,000 or more, judgment would, nevertheless, have gone for the respondents. This is so, because the

delivery would have been made under a separate order as distinguishd from an over-all contract and because more than 90 days elapsed between such hypothetical delivery on March 5, 1957 and the preceding delivery on October 31, 1956. The Court of Appeals' opinion makes this quite apparent (Petition, Appendix B, pp. 19, 20, 21):

> "The principal question on this appeal concerns the date when the Miller Act, 40 U.S.C. § 270b(a), requires notice to be given to a contractor by a materialman who has furnished supplies to a subcontractor pursuant to a series of orders as distinguished from an over-all contract. * * *"
>
> "On April 5, 1957 Edwards served a notice on Reiss by certified mail. The notice asserted a claim in the amount of $6,274.44 against Greene for electrical supplies furnished Greene at various times from on or about August 24, 1956 to March 5, 1957, for use in Greene's performance of contract obligations to Reiss, for electrical work on the Lido Beach facility."
>
> "* * * *In this case any rights of Edwards to make claim against Reiss and the surety with respect to the deliveries of August, September and October, 1956, ended on January 29, 1957.* From that day forward Reiss could have made payments to Greene free from any liability to Edwards under the Miller Act with respect to all these deliveries. * * *" (Italics supplied.)

C. In arriving at its decision, the Court of Appeals undoubtedly adopted the respondents' argument below, under their Point II, entitled: "The ninety-day notice requirement is for the general contractors' protection" (Respondents' Brief, Court of Appeals, p. 22). Respondents argued, under said Point II (Respondents' Brief, Court of Appeals, p. 24):

> "* * * Actually Edwards, having no contract with Greene except as each separate order was given should have given his notice within 90 days after the first shipment on August 24th amounting to $8,109.53."

It should be observed that the District Court held the Miller Act notice of April 5, 1957 insufficient for the sole reason that there was no proof that the safety switch amounting to $15.90 was tied in with the prime contract (Petition, pp. 7, 8). If it had been so tied in, judgment would have gone for the petitioner as the District Judge pointedly stated (27a):

> "Concededly a delivery of such material was made on October 31, 1956. If that date was the last time such contract material was delivered then the notice of April 5, 1957 was too late and not within the ninety days' period.
>
> *The plaintiff claims a later delivery, the delivery of a switch costing $15.90, on March 5, 1957. This claim is the principal issue in the case. If sustained, the notice of April 5, 1957 would have been timely, as within the ninety days' provision."* (Italics supplied.)

Significantly, the affirmance in the Court of Appeals, was upon grounds not even discussed by the District Judge (Petition, Appendix B, 19-21).

D. Respondents contend that the case at bar is *"sui generis* and one which finds no counterpart in any case decided thus far in any court" (Respondents' Brief, p. 3). In the Court of Appeals below, respondents argued quite differently (Respondents' Brief, Court of Appeals, pp. 12, 13):

> "United States of America to the use of Noland v. Allied Contractors is a case directly in point. In that case the Court was confronted with a situation where sales were made to a subcontractor from time to time without any fixed contract to furnish all of the materials required on the project. In short, the situation was exactly as in the case at bar, the subcontractor in both cases being free to buy its material anywhere and from anyone it chose. The sales in question were made pursuant to separate and distinct contracts or orders and were not the result of one undertaking to furnish all of the required materials for the job. In

short, it is almost an exact duplicate of the instant situation.

"In the cited case the notice was served on May 5, 1955. The record indicates (p. 571 of the Opinion) six separate sales beginning on December 28, 1954 and ending April 6, 1955. The Court held that the notice served on May 5, 1955 could only create liability for materials delivered within ninety days prior to May 5, 1955."

A comparative analysis of the opinions in Noland (4th Cir., CCA 273 F. 2d 917), Bregman and the case at bar, can only serve to generate uncertainty and confusion in the application of the Miller Act. It is respectfully submitted that this situation requires correction by the Supreme Court particularly since it affects all Governmental construction. Certainly, materialmen who deliver material to government projects under separate orders, issued by sub-contractors, should not be discriminated against, in favor of those delivering material under entire contracts. The Congress never intended such bizarre result.

## *CONCLUSION.*

***In view of the importance of the questions involved and the conflict of opinion between the different Circuit Courts of Appeal, a writ of certiorari should issue as prayed for in the petition.***

Dated: April 8, 1960.

Respectfully submitted,

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## Proof of Service.

I, IRVING LEVINE, counsel for the petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 8th day of April, 1960, I served three (3) copies of the foregoing Petitioner's Reply Brief on the Respondents, Peter Reiss Construction Co., Inc., and The Travelers Indemnity Company, by mailing said copies in a duly addressed envelope, with first-class postage prepaid, to Respondents' attorney of record, David Morgulas, Esq., 521 Fifth Avenue, New York 17, N. Y.

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